IN THE HIGH COURT OF JUDICATAURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

The New India Assurance Company Ltd.	vs.	Smt. Kanchan Devi & anr.

S.B.Civil Misc.Appeal No.103/1999 against the order dated 11.11.1998 passed by the learned Motor Accident Claims Tribunal, Nimbaheda in Case NO.5/92.

Date of Judgment: November 06, 2006.

PRESENT.
HON'BLE MR. PRAKASH TATIA, J.

Mr. R.K. Mehta for the appellant.
Mr.Manish Pithaliya for the respondents.

BY THE COURT:

REPORTABLE

The question for consideration of this Court has been raised by the appellant Insurance Company that whether the respondent-claimant in an appeal preferred by the insurer, against the award of compensation under Section 173 of the Motor Vehicles Act, the claimant-respondent can submit the cross-objection for enhancement of compensation.

Brief facts of the case are that the accident occurred on 8.5.1992 causing death of one Ghisa Lal Teli. The claimants, legal heirs of deceased Ghisa Lal, submitted claim petition before the Motor Accident Claims Tribunal, Nimbhera seeking compensation of total Rs.4,15,000/-

from the driver and owner of the vehicle as well as from the appellant Insurance Company. The claim petition was allowed by the Motor Accident Claims Tribunal vide award dated 11.11.1998. Aggrieved against the said award, the Insurance Company preferred appeal. The appellant-Insurance Company's contention in the appeal was that the driver had no valid driving licence to drive the heavy goods vehicle and, therefore the appellant Insurance Company is not liable to reimburse the compensation to the insured as the insured had breached the condition of policy. The insurer has not challenged the award on other issues for obvious reason that the Insurance Company was under impression that the Insurance Company has limited defence to contest the claim and award, therefore, they can prefer appeal to challenge the award only on limited grounds.

The respondent claimant submitted cross objection on 21.4.1999 before this Court after giving copy of the cross objection to the learned counsel for the appellant which is apparent from the record of the court. Though the appeal was for service of respondents no.5 and 6 but this Court finding that Hon'ble the Apex Court has made the legal position clear by pronouncing judgment in the case of National Insurance Co. Ltd. vs. Swaran Singh & ors(2004 AIR SCW 663), held that the plea taken by the appellant Insurance Company will not be sufficient to absolve the appellant Insurance Company from its liability to pay

compensation. Therefore, this Court vide brief order dated 14.12.1005 dismissed the appeal of the appellant Insurance Company. Since the cross-objection was filed by the claimant, therefore, the matter was fixed for orders on cross-objection of the respondent-claimants.

The learned counsel for the Insurance Company has raised an objection that since the appellant has preferred appeal to challenge the award on the basis of the legal defence available to the appellant and has not challenged any finding on other issue as the appellant could not have challenged the award on other questions of fact which are and could have been contested only by the co-respondent-driver and owner of the vehicle, therefore, the claimant cannot raise any issue and cannot challenge the findings of the tribunal recorded against only co-respondents and in which appellant is neither interested nor can contest. According to the learned counsel for the appellant, the cross-objection can only be directed against the appellant and not against the co-respondent. The learned counsel for the appellant relied upon the leading judgment of the Hon'ble Apex Court delivered in the case of Panna Lal v. State of Bombay (AIR 1963 SC 1516) and the Division Bench judgment of the Madras High Court delivered in the case of United India Insurance Co. Ltd. vs. Rajammal and others (1993 ACJ 486), the judgment of the Kerala High Court delivered in the case of Oriental Insurance Co. Ltd. vs. Sadanandan (2001 ACJ 1368) and the recent

Division Bench judgment of the Madras High Court delivered in the case of Branch Manager, New India Assurance Co. Ltd. vs. Salat Mary and others (2006 ACJ 675). According to the learned counsel for the appellant, the judgment of the Hon'ble Apex Court delivered in the case of Panna Lal's case (supra) came up for consideration before the High Court of Madras and Kerala and the Division Bench of the Madras and Kerala High Court also held in appeal preferred by the insurer that the claimant-respondent cannot submit cross-objection to challenge the issue decided by the Motor Accident Claims Tribunal against the co-respondents driver and owner of the vehicle.

The learned counsel for the respondent-claimants submitted that as per Order 41 Rule 22, C.P.C., as soon as an appeal is preferred to challenge any decree or award, the respondents can not only support the decree on the grounds on which the court below passed the decree but may also state that the finding against him recorded by the court below in respect of any issue ought to have been in his favour. It is also submitted that Order 41 Rule 22, C.P.C. makes it expressly clear that he "may also take in cross objection to the decree which could have taken by way of appeal". Therefore, the cross-objection is virtual appeal against the decree (in this case award) by the respondent. It is also submitted that in fact the cross-objection is against the finding on issue or decree and not an appeal against the person-appellant. The learned

counsel for the respondent-claimants relied upon Full Bench decision of the Karnataka High Court delivered in the case of Natiional Insurance Company Limited, Bangalore vs. Smt. Prema and others (2002(3) T.A.C. 724) Kant.).

I considered the submissions of the learned counsel for the parties and perused the facts of the case and gone through the relevant provisions of law as well as the judgment relied upon by the learned counsel for the parties.

Order 41 Rule 22, C.P.C. was considered by the Hon'ble Apex Court in Panna Lal's case (supra). Hon'ble the Apex Court held as under:-

> "In our opinion, the view that has now been accepted by all the High Courts that O.41 R. 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under O.41 R. 22 can be directed against the other respondents, is correct. Whatever may have been the position under the old S.561, the use of the word "cross-objection" in O.41 R.22 expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant"

The Hon'ble Apex Court observed that “the question whether the respondents could by way of cross-objection seek relief against another respondent under Order 41 Rule 22, C.P.C. and earlier under Section 348 of the Code of Civil Procedure, 1959 and thereafter under Section 561 under the Code of Civil Procedure Code, 1877 and Code of 1882, first raised before the Court almost century ago. Both the Calcutta and the Bombay High Court in a number of cases held that ordinarily it was not open to a respondent to seek relief as against a co-respondent by way of objection, though in exceptional cases this could be done.(Vide Burroda Soonduree Dossee v. Nobo Gopal Mullick \, 1864 Suth WR 294: Maharaja Tarucknath Roy v. Tuboornnisa Chowdhrain, 7 Suth WR 89(1); Ganesh Pandurang v. Gangadhar Ramkrishna, 6 Bom HCAC 244 and Anwar Jan Bibi v. Azmut Ali,15 SudhWR 26). Above decision were given under Code of 1859 under Section 348 and under Section 561 of the Code of 1877 and the Code of 1882. The Hon'ble Apex Court also took note of the decision of the Patna and Allahabad High Court, taking the same view as mentioned above. The Patna and Allahabad High Court also took the view that the cross-objection should be limited to asking the relief against the appellant only and it is only where the appeal opens up questions which cannot be disposed of properly except by opening a matter as between co-respondent that relief against respondent can also be sought by way of objection.

The Full Bench of the Madras High Court in the case of Venkateswarlu v. Ramamma (ILR (1950) Mad. 874: (AIR 1950 Mad. 379) considered the same question and decided overruling of previous decisions that on a proper construction of language, Order 41 Rule 22, confers only a restricted right on the respondent to prefer the objection to the decree without filing a separate appeal, that such objection should, as a general rule be primarily against the appellant, though in exceptional cases it may incidentally be also directed against the other respondent.

In Panna Lal's case (supra), the State preferred appeals to the High Court. In the appeal preferred by the State, the plaintiff-respondent prayed that the High Court should pass decree against co-respondent Deputy Commissioner, Bhandara, under Order 41 Rule 33, C.P.C. That prayer was rejected by the High Court by saying that though the provisions of Order 41 Rule 33 are wide enough to permit the High Court, to pass decree in favour of the respondent but the High Court rejected the prayer by saying that we do not see any reason why we should exercise our power when it was open to respondent no.1 to prefer cross-objection against the dismissal of his suit against these defendants as well as against some other defendants. Faced with this situation, a prayer was also made by the plaintiff-respondent before the High Court that permit him to file cross-objection at this stage, but that

prayer was also declined by the High Court. The matte came up before Hon'ble the Apex Court as the High Court granted certificate under Article 133(1)(c) of the Constitution of India. Therefore, Hon'ble Apex Court, in that background, considered the question whether the cross-objection can be preferred seeking relief against the co-respondent and whether not submitting of cross-objection by the respondent, disentitled the respondent from any relief under Order 41 Rule 33,C.P.C. Hon'ble the Apex Court approved the view expressed by various High Court in past and held that Order 41 Rule 22, C.P.C. permits ,as a general rule, to the respondent to prefer an objection directed only against the appellant. Hon'ble the Apex Court in the same line further declared that it is only in exceptional cases, such as where the relief sought against the respondent in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under Order 41 Rule 22 can be directed against the other respondents.

Even after declaring the law in above terms, the Hon'ble Apex Court in Panna Lal's case(supra), where no cross objection was filed by the respondent seeking relief against the co-respondent, held that the High Court was wrong in refusing to consider what relief, if any, can be

granted to the plaintiff(respondent) under the provisions of Order 41 Rule 33, C.P.C. (obviously against co-respondents).

The Division Bench of the Madras High Court in the case of United India Insurance Co. Ltd. vs. Rajammal and others (supra) and the Division Bench of the Kerala High Court in the case of Oriental Insurance Co. Ltd. vs. Sadanandan (supra) and the Madras High Court in the case of Branch Manager, New India Assurance Co. Ltd. v. Salat Marry (supra), on the basis of the decision of the Hon'ble Apex Court in Panna Lal's case, held that where the Insurance Company has preferred appeal against the award of the Motor Accident Claims Tribunal and where the Insurance Company has not questioned the finding on issue of negligence or quantum of compensation, the claimants cannot submit cross-objection under Order 41 Rule 22, C.P.C. for enhancement of compensation.

Panna Lal's case (supra) came up for consideration before the Full Bench of the Karnataka High Court in the case of National Insurance Company Limited, Bangalore vs.Smt. Prema and others (supra).The Full Bench of the Karnata High Court considered the another latter judgment of the Hon'ble Apex Court delivered in the case of Mahant Dhangir and another v. Madan Mohan and others (AIR 1988 SC 54: 1987 (supp) SCC 528) and the judgment of the Hon'ble Apex Court delivered in the case of United India Insurance Co. Ltd. vs. Bhushan Sachdeva and others

((2002) 2 SCC 265). The Full Bench of the Karnataka High Court observed that the legal position that the respondent cannot prefer cross-objection to seek relief against co-respondent, was in the context of legal position as then existed because at that point of time, the Insurance Company had no right to prefer the appeal to challenge the quantum of compensation and insurer's right was consigned to only to the liability to pay the compensation. According to the Full Bench of the Karnataka High Court, in view of the law declared by the Hon'ble Apex Court in the case of National Insurance Company Limited,Bangalore vs.Smt. Prema (ors.) the insurer cannot file an appeal at all,is based on erroneous assumption, is the position after the decision in the case of Bhushan Sachdeva(supra). The Full Court held that Hon'ble the Apex Court in the Bhushan Sachdeva(supra) case held that there is nothing in Section 173 or in the other relevant provisions of the Act which debars the Insurance Company to resort to the remedy when it knows that the award is unjust. The Full Court of the Karntaka High Court held that the appeal is continuation of original proceeding and the entire subject matter of the claim-petition is before the appellate court and therefore, even if the appellant has filed the appeal, only against the part of decree, the court can consider the entire matter and pass appropriate orders and, therefore, the cross-objection is maintainable in a case where the appeal has been preferred against the insurer against the

award passed by the Motor Accident Claims Tribunal.

It will be worthwhile to consider the decision of the Hon'ble Apex Court delivered in the case of United India Insurance Co. Ltd. vs. Bhushan Sachdeva and others (supra). In Bhushan Sachdeva's case (supra), the accident took place on 27.8.1994 and in that accident Tulsi Das Sachdeva died and some of his kiths and kins sustained serious injuries. The claimants claimed compensation of Rs.55.56 lacs. The Claim's Tribunal awarded compensation of Rs.12,53 lacs. For the compensation, the respondent the owner of the vehicle and the Insurance Company both were also liable jointly and severally. The award was not challenged by the 5th respondent-insured owner of Maruti Car with which accident occurred. He did not prefer appeal obviously because of the reason that he need not to pay a single pie against the award amount as the entire burden to pay the compensation was on the insurer. The Insurance Company preferred appeal against the award contending that the award is in gross violation of the principles of natural justice and is unjust and arbitrary. The Insurance Company felt that the appeal could not be filed by the insurer to challenge the award, the Insurance Company preferred the revision petition before the High Court. In the revision petition, the Insurance Company sought stay of execution of the award but no interim relief was granted to the Insurance Company and the High Court directed only to issue only show

cause notice to the respondent. The Insurance Company approached the Hon'ble Apex Court for interim relief, then the matter arose whether the Insurance Company could not have preferred appeal under Section 173 of the Motor Vehicles Act, 1988. Hon'ble the Apex Court in Bhushan Sachdeva's case (supra) observed that “we must bear in mind that the nationalised insurance companies in India are holding public money. What they have to deal with is public fund. They are accountable to the public for every pie or it. If it is held that no insurance company should feel aggrieved even if the award is seemingly unjust and that such awarded amount should go out of the public fund, it is public interest which suffers. If the insurance company has reason to believe that the award was obtained fraudulently which fact was not known to the insured, should we allow public money to be given to satisfy such an award ? In such cases the insurance company must feel aggrieved. Any interpretation denying such aggrieved insurance companies the opportunity to seek the legal remedy of appeal should not be adopted unless there is a statutory compulsion. There is nothing in Section 173 or in the other relevant provisions of the Act which debars the insurance company to resort to the remedy of appeal when it knows that the award is unjust.” Honb'le the Apex Court in view of the above reasons held that “the insurance company can fall within the ambit of the words “any person aggrieved by an award of a Claims Tribunal” as used in

Section 173(1) of the Act, when the insured failed to file an appeal against the award."

Hon'ble the Apex Court also considered the Section 149(2) and Section 170 of the Act of 1988 and held that the insurer can be permitted to resist the claim even apart from the limited grounds enumerated under Section 149(2) of the Act under two eventualities; (1) one is that there is collusion between the claimant and insurer and (2) second is when the insured failed to contest the claim. Hon'ble the Apex Court further held that "The person against whom the claim is made is normally the insured of the vehicle involved in the accident. When he failed to contest that claim made against him the insurer gets the opportunity to contest such claim on all or any of the grounds available to the insured. Such a provision was absent in the Motor Vehicles Act, 1939 initially and Parliament inserted it therein only in March 1970. The right of the insured to contest a claim does not stop with the end of the proceedings before the Tribunal." The Hon'ble Apex Court also considered the meaning of the words "failed to contest" and held that these words must be interpreted in realistic manner. The right to contest would include the right to contest by filing an appeal against the award of the Tribunal as well. Hence the insured can continue to contest the claim by filing an appeal as provided under Section 173 of the Act. Hon'ble the Apex Court categorically held that "If the insured

fails to prefer an appeal that also would amount to failure to contest that claim effectively. Quite often the insured would lose the desire to contest the claim once he is told that he would not be mulcted with the liability as the same is siphoned off to the insurer. It means that the insured had dropped out from contesting a claim midway. In such an eventuality the Act enables the insurer to contest it on all grounds available to the insured."

In the present case, as stated above, the accident occurred on 8.5.1992. Before the Motor Accident Claims Tribunal, both driver and owner did not appear and contest the claim. The insured and the driver did not prefer appeal to challenge the award. The appellant Insurance Company is liable to pay the compensation amount to the claimants as per award. The driver and owner cum insurer do not choose to prefer appeal against the award for obvious reason that they need not to pay a single pie against the award dated 11.11.1998, therefore, in view of Bhushan Sachdeva's case(supra) it is a case where insured failed to contest the claim case and further did not prefer appeal which in the light of decision of the Bhushan Sachdeva's case amounts to failure to contest that claim effectively. Therefore, the appellant insurer Insurance Company could have challenged the award of the Tribunal dated 11.11.1998 on all the grounds apart from the defence available under Section 149(2) of the Act of 1988. That means that the appellant

Insurer had no right to challenge the findings on other issues. It is not relevant on what grounds the impugned decree (in present case award) has been challenged by the appellant. The relevant factor is that whether the appellant could have challenged the entire decree or award on all issues or not and if the appellant could have challenged the finding on all issues recorded by the court below or the tribunal, then in such situation, the respondent gets right to submit cross-objection for getting the relief against co-respondent. Further peculiarity in the motor accident case is that the ultimate liability is of the insured to pay the entire compensation and the person upon whom the total liability to satisfy the award, has preferred appeal then in that situation, if the respondent is asked to file separate appeal, then that will only multiply the proceedings for no good reason because of the reason that the court will prefer to decide two appeals together. It will become more a question of form by which the issues are challenged by the parties to the same litigation. At this juncture, Order 41 Rule 33 C.P.C. is also relevant, which empowers the court to grant relief to non-appealing respondent. If a respondent can get relief from the court without filing the cross-objection and cross appeal, then denial of right to submit cross-objection cannot serve any purpose, rather say it will result into multiplicity of the proceedings. Further at this place it will be worthwhile to mention that Hon'ble the Apex Court in the case of Panna

Lal(supra) as back as in the year 1963 in a situation where the respondent-plaintiff did not submit cross-objection and the High Court refused to grant relief to the plaintiff-respondent under Order 41 Rule 33,C.P.C., against co-respondent then the Hon'ble Apex Court held that the High Court was in error and has wrongly refused to exercise its power under Order 41 Rule 33, C.P.C. under assumption of incorrect view of the law. Hon'ble the Apex Court in Panna Lal's case held that the decision of the Privy Council in Anath Nath's case ,AIR 1939 PC 86, should not be considered as an authority for the proposition that the failure to file the cross-objection where such objection can be filed under the law invariably and necessarily excludes the application of Order 41 Rule 33. In view of the above reason also, it will be appropriate to hold that in a case where the claimant's case has not been contested by the driver and/or owner of the vehicle before the Tribunal or both have not preferred appeal against the award of the Tribunal, then if the Insurance Company prefers appeal to challenge the award, the claimants can submit the cross-objection for enhancement of the compensation amount.

In view of the above, the preliminary objection of the appellant Insurance Company against the maintainability of the cross-objection is rejected.

(PRAKASH TATIA),J.

mlt.